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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANT LAVINE

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STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANT LAVINE

The appellant, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States files this statement of the basis upon which it is contended that the Supreme Court of the United States had jurisdiction on

direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

The case at bar was before this Court before (*Lavine* v. *Shirley*, 409 U.S. 1052 [No. 72-582]).

On December 11, 1972, this Court issued its order that:

> "The judgment is vacated and the case remanded to the United States District Court for the Northern District of New York for further consideration in light of Chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a as amended). *Differderfer* v. *Central Baptist Church*, 404 U.S. 412 (1971)."

Opinion Below After Remand
(Not yet reported)

The three-judge District Court on September 23, 1973 rendered its "Memorandum-Decision and Order" which was filed September 26, 1973. The "Memorandum-Decision" was amended by order of October 4, 1973. The "Memorandum-Decision", as amended, is set out as Appendix "A" to this jurisdictional statement.

The opinion below noted that the amended complaint does not reallege facts concerning the original named plaintiffs and that such omission was "by design since they no longer feel themselves aggrieved due to intervening events." The Court below found that, in its present posture, the case "• • • is an action by Anna Stuck on behalf of herself, her minor children and all others similarly situated, seeking declaratory and injunctive relief from enforcement against them of section 101-a of the New York Social Services Law because of their failure to cooperate in support of proceedings • • •."

The Court below was of the opinion that the plaintiffs "raised a substantial question with respect to the constitutionality of New York Social Services Law § 101-a as amended" but the Court disposed of the case on the "statutory claim rather than indulge in a constitutional ruling."

The Court below stated that "* * * while we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by § 101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits".

The Court below discussed 45 C.F.R. § 233.90(b) (4) (i) (ii)[1] and indicated that it had withheld decision until after the effective date of that regulation in order "to authoritatively consider its effect." The Court found that the "agency's new interpretation is in error and not a guidepost to be followed judicially."

Class action status was denied because of the pendency of *Lewis* v. *Lavine* (Dkt No. 72-CV-4249 (S.D.N.Y.)) a case also involving Social Services Law § 101-a in which a class action order had been made.

Finally, the Court below denied plaintiff's demand for retroactive payment.

The Order itself is discussed under *"Jurisdiction" infra.*

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[1] A regulation of the Secretary of Health, Education and Welfare providing that a State is not required to make provision in its AFDC program for the maintenance of a parent or caretaker who fails to assist (1) in the establishment of paternity or (2) in seeking support from a person having a legal duty to support the child. (Published May 3, 1973 to be effective July 2, 1973 and set out in full *infra.*)

Jurisdiction

After remand and on or about March 14, 1973 the plaintiffs moved to amend their complaint, and Anna Stuck, a mother who refused to cooperate in locating the putative father of her youngest child, moved for permission to intervene in the action. By its order dated April 9, 1973 and entered April 18, 1973, the three-judge Court authorized plaintiffs to "amend their complaint so as to comply with the remand order of the Supreme Court by bringing the question of the validity of New York Social Services Law 101-a(2) (3) before this Court" and further ordered that "Anna Stuck may intervene as a plaintiff in the action" Jurisdiction was alleged in the amended complaint "to be conferred • • • by *42* (*Sic*) U.S.C. Section 1343(3) (4) • • • 28 U.S.C. Section 1331 • • • and 28 U.S.C. Section 2201 • • •."

The appeal herein is from the final order made in the United States District Court for the Northern District of New York by the three-judge panel (28 U.S.C. §§ 2281 and 2284) after remand by this Court. That order granted summary judgment in favor of plaintiff Anna Stuck against defendants below "declaring section 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC," and permanently enjoined the defendants "from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children."

The order further denied class action status and denied "plaintiff's demand for retroactive payment of the amounts wrongfully withheld from her."

The amended complaint sought declaratory and injunctive relief alleging that "[o]n its face and as applied by the Onondaga County Department of Social Services, the New York NOLEO[2] provision is invalid as establishing an additional eligibility requirement not provided for by the Social Security Act." The complaint further alleges "denial of the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Final judgment by the Court below granting relief as to plaintiff Anna Stuck only was dated September 23, 1973 and entered September 26, 1973 (Memorandum-Decision amended by order of October 4, 1973).

Notice of Appeal was filed on November 14, 1973 on behalf of the appellant Lavine, State Commissioner of Social Services, in the United States District Court for the Northern District of New York, a copy of which Notice is set out in the appendix herein as Appendix "B".

In the Notice of Appeal filed on behalf of appellant Lavine no appeal has been taken from such part of the order of the three-judge Court as permanently enjoined defendants from denying or terminating AFDC assistance to the minor children of Anna Stuck as provided in the order.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment above cited pursuant to the terms of 28 U.S.C. § 1253.

Jurisdiction of the Supreme Court to review the judgment below on direct appeal in this case is sustained by the Court's prior order in *Lavine* v. *Shirley*, 409 U.S. 1052 (#72-582).

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[2] Notice to Law Enforcement Officers.

The following decisions, it is submitted, further sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case: *Taylor* v. *Martin*, 330 F.Supp. 85 (U.S.D.C., N.D. Calif. 1971), affirmed *sub nom. Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Meyers* v. *Juras*, 327 F.Supp. 759 (D.Or., 1971) affirmed 404 U.S. 803 (1971) reh. den. 404 U.S. 961, and *Doe* v. *Swank*, 332 F.Supp. 61 (N.D. Ill. 1971) affirmed *sub nom. Weaver* v. *Doe*, 404 U.S 987 (1971).

Statute Involved of the State of New York

New York Social Services Law, § 101-a(2) (3)[3]
(52A McKinney's Social Services Law,
Page 35, pocket part)

"§ 101-a Proceedings to compel support by persons in need thereof

• • •

"2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

"(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

"(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act.

"(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act.

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[3] As added by Chapter 687 of the Laws of New York of 1972. Section 4 of Chapter 687 provides as follows:

"§ 4. The provisions of this act shall be ineffective to the extent that they are determined to be not in compliance with federal law regulations pertaining to public assistance and care."

"3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipient fails to assist or cooperate as required by the provisions of this section or other provisions of law."

Regulation Involved of the Secretary of Health, Education and Welfare[4]

45 C.F.R. § 233.90(b)(4)(i)(ii)

"§ 233.90 Factors specific to AFDC.

• • •

"(b) *Condition for plan approval.*—

• • •

"(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist;

"(i) In the establishment of paternity of a child born out of wedlock; or

"(ii) In seeking support from a person having a legal duty to support the child; But neither this nor any other provision of these regulations should be

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[4] The three-judge Court discussed the regulation and concluded:

"Moreover, the unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judicially."

The Court below did not solicit the views of the Secretary of Health, Education and Welfare concerning the new regulation. This Court, however, has now apparently done so in *Burns* v. *Doe* (No. 73-406). (See "Question Involved", *infra*.)

construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.

* * *"

(38 Federal Register 10940, May 3, 1973, to be effective July 2, 1973.)

Statutes of the United States

42 U.S.C. § 602(a)(7), (11), (17), (18), (21) and (22) is set out as Appendix C.

Questions Involved

Do the provisions of New York Social Services Law, § 101-a(2)(3) that a social services official shall not provide assistance or care for the maintenance of a parent, who is an applicant for or recipient of public assistance, who willfully fails or refuses to furnish evidence to support a petition by a social services official, brought in the Family Court of the State of New York under appropriate provisions of the Family Court Act, to establish a child's paternity and support or to secure support for such applicant's or recipient's child and herself or to furnish appropriate information including the location of the other parent, so long as such parent fails to assist or cooperate as required by such section or other provisions of law, conflict with the provisions of the Social Security Act? Does a regulation of the Secretary of Health, Education and Welfare authorizing denial of maintenance to a parent who fails to provide such assistance conflict with the provisions of the Social Security Act?[5]

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[5] Before remand, the case was concerned only with an alleged requirement that parents or relatives institute or prosecute *non-support actions* against abandoning or deserting parents. After remand the only claim

(Footnote continued on following page)

Although this Court has considered cases in which a *child and a parent* have been denied assistance for the failure of the parent to cooperate with social services officials, it appears that the precise question here presented has not been passed upon by this Court.

The Court is, however, respectfully directed to a Petition for Certiorari filed on September 4, 1973 in the matter of *Burns* v. *Doe* (No. 73-406) which, *inter alia*, states the following question:

> "I. Whether a state can grant an ADC (AFDC) grant which includes only the needs of a minor child when the mother refuses to assist the State in its efforts 'to establish the paternity of such child and secure support for him' pursuant to Title 42 U.S.C. § 602(a)(17)(A)(i);"

On December 11, 1973, the Court invited the Solicitor General to file a brief in *Burns* v. *Doe* and in *Doe* v. *Burns*, (No. 73-5650—Cross Petition) expressing the views of the United States which, presumably, will extend, *inter alia*, to the view of the United States concerning the quoted question from *Burns* v. *Doe* (No. 73-406).

(Footnote continued from preceding page)
considered was that of Anna Stuck who refused to cooperate in connection with a proceeding to determine *the paternity* of her youngest child. The order of the Court below, however, declares New York Social Services Law § 101-a as amended "void, unenforceable and without effect insofar as it makes recipient cooperation in a *paternity or support* action against an absent parent a condition of eligibility for AFDC." (emphasis supplied). The "Question" has been framed in response to that declaration.

Statement of the Case

The plaintiffs in the original complaint (appellees on the first appeal prior to remand) were persons against whom it was claimed that New York Social Services Regulation 18 NYCRR § 369.2(f)(3)(ii)(e) had been applied. The final order in the case dated July 14, 1972 (before remand) had found that such regulation "violates the Social Security Act and regulations promulgated thereunder to the extent that it requires parents or relatives of needy and dependent children to institute and prosecute non-support actions against abandoning or deserting parents or spouses as a condition of eligibility for AFDC," and that order also permanently enjoined defendants from "terminating or denying AFDC to members of the plaintiff class because of their failure or refusal to institute or prosecute actions for non-support."

After this Court's remand, the attorney for plaintiffs moved as heretofore indicated for permission to serve an amended complaint and to intervene Anna Stuck. When that motion came on to be heard before United States District Court Judge, PORT, appellant moved to dismiss the action for lack of subject matter jurisdiction on the ground that the case had become moot by reason of plaintiffs' failure to comply with the remand of this Court.[6] Judge PORT ordered the motion to dismiss to be held for action by the three-judge Court.

The Amended Complaint

The amended complaint (permitted by the Court's order of April 9, 1973) made no statement of claim on behalf of the plaintiffs in the original action. The Court in its Memorandum-Decision of September 23, 1973 noted that:

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[6] The original plaintiffs had failed to amend or supplement their complaint to show that section 101-a(2) (3) was being applied as against them. The County officers filed a similar motion.

> "The amended complaint does not reallege the facts concerning the original named plaintiffs. This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated * * *."

The amended complaint contains the following "Statement of Claim" on behalf of the intervening plaintiff, Anna Stuck:

> "Intervening Plaintiff Anna Stuck has been receiving public assistance for herself and her four infant children since 1970. She was required by the Onondaga County Department of Social Services to appear at their offices for the biannual recertification of her eligibility for public assistance. She did so on February 2, 1973. She was told that she must bring a paternity action against the father of her youngest child herself, or authorize the Department to do so, and that she must cooperate fully with the Department in such an action. She refused to cooperate in the bringing of such an action; her refusal was based on the fact that the father of her youngest child is disabled and is not able to support the child. Furthermore, she had been required by the Department of Social Services to file a paternity suit against the father of her first three children. That filing had lead to constant strife between her and the respondent. She does not wish to duplicate that situation with the father of her youngest child."

The amended complaint alleges two causes of action. The first cause of action alleges that New York Social Services Law § 101-a(2)(3) "establishes an additional eligibility requirement not provided for by the Social Security Act." Constitutional allegations are set forth in the second cause of action as follows:

> "Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment

to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment."[7]

Answer of Appellant Lavine

The State Commissioner of Social Services (appellant here) filed his answer to the amended complaint "without prejudice to his opposition to the Court's order of April 9, 1973." As appears from such answer, the appellee Anna Stuck had a departmental fair hearing on March 1, 1973. Returned with the answer was the fair hearing decision of March 7, 1973. That fair hearing decision stated in part:

> "Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the fair hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided.
>
> "The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation to be a basis for termination of her assistance."

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[7] We submit that appellees' constitutional allegations are without merit on their face. The finding of substantiality by the Court below is unexplained and may have been influenced by the many NOLEO decisions rather than by the sufficiency of the amended complaint itself. "Substantiality" we leave for plenary discussion if probable jurisdiction is noted by the Court.

The answer, *inter alia*, denied the allegations set forth in plaintiffs' first and second causes of action.

Separate affirmative defenses of failure to state a claim upon which relief could be granted were alleged as to the original plaintiffs and as to plaintiff Stuck. As has been noted, appellant Lavine's motion to dismiss the action on the grounds that the case had become moot was held by Judge Port for the three-judge Court. The answer sets out such grounds as an affirmative defense, and additionally, sets out the affirmative defense of lack of subject matter jurisdiction under 28 U.S.C. § 1343 and under 28 U.S.C. § 1331 (These additional grounds were also contained in a motion to dismiss served coincidentally with appellant's answer and returnable before the three-judge Court on the argument on May 11, 1973 and are set out below[*]). Further affirmative defenses were lack of jurisdiction to award damages as prayed for in the amended complaint against defendant Lavine (appellant here); lack of standing and lack of capacity to sue; lack of an actual case of controversy, lack of a justiciable controversy; that plaintiffs Shirley, Anderson and Doe had failed to exhaust administrative remedies and that all plaintiffs had failed to exhaust State judicial remedies; and finally, that New York Social Services Law § 101-a(2)(3) is valid and constitutional.

The court below considered the motions to dismiss as motions for summary judgment and granted summary judgment in favor of the plaintiff Anna Stuck only.

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[*] "(a) The Court lacks jurisdiction under 28 U.S.C. § 1343 in that the amended complaint fails to present a substantial constitutional question, and by reason thereof, this Court lacks jurisdiction to determine any pendent statutory question."

"(b) The Court lacks jurisdiction under 28 U.S.C. § 1331 in that plaintiffs have not satisfied the requirements thereof."

The Questions are Substantial

I

The volume of litigation generated by state activity in the area of enlisting parental cooperation in obtaining support payments from absent fathers shows that the question presented is substantial. Substantiality is further demonstrated by the drain upon finite state resources caused by the failure of an abandoning or deserting parent to contribute toward the support of a dependent child.

This court has summarily affirmed three District Court decisions in this area. These are *Taylor* v. *Martin*, 330 F.Supp. 85 (U.S.D.C., N.D. Calif. 1971), affd. *sub nom. Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Meyers* v. *Juras*, 327 F.Supp. 759 (D.Or., 1971) affd. 404 U.S. 803 (1971), reh. den. 404 U.S. 961 and *Doe* v. *Swank*, 332 F.Supp. 61 (N.D. Ill., 1971) affd. *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971). In each of the cited cases, attempts had been made to deny AFDC benefits not only to uncooperative mothers, but to their children as well. The Court's summary affirmances appear to have been grounded upon the holding of *King* v. *Smith*, 392 U. S. 309 (1968) that the appeal in that case raised "• • • only the question whether the State may deal with • • • problems • • • *by flatly denying* AFDC assistance to otherwise eligible dependent children." (P. 320.) (Emphasis supplied.)

The case at bar, however, is different from the cited cases in that New York does not remove otherwise eligible children from AFDC assistance for the failure of their mother to cooperate in locating and obtaining support from a deserting or abandoning parent.

On the contrary, under the provisions of New York Social Services Law § 101-a(2)(3), it is only the mother

who stands to lose benefits for her refusal to cooperate. And under State Social Services Departmental Regulation 18 NYCRR § 369.2(f)(3)(ii)(e) which was before this Court on the first appeal in this case, only the mother stood to lose benefits.

Involved here is the fundamental question of whether the mother can refuse to cooperate with social services officials in locating and obtaining support from deserting or abandoning parents.[9]

The case at bar, no less than *Wyman* v. *James*, 400 U.S. 309 (1971) presents the question of whether a mother may obtain AFDC "*upon her own informational terms*" (p. 321) by her failure to cooperate in locating and obtaining support from a deserting or abandoning parent.

In *Wyman* v. *James, supra*, this Court recognized that AFDC could be denied to a family unit for failure of the mother to permit a home visit by a social worker thereby furnishing square precedent for reversal of the decision below in the case at bar in which only the mother is denied AFDC benefits (the children's benefits continue) for her failure to cooperate in locating and obtaining support from the father of her children.

And *Wyman* v. *James* can no longer be distinguished on the theory that it was decided upon only constitutional

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[9] Compare 42 U.S.C. § 602(a) (7) that a State plan must "• • • provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;" New York Social Services Law § 101-a(2) (3) does not establish an additional condition of eligibility but provides the only practical means of determining whether or not an individual is entitled to AFDC in the first place.

grounds, the statutory argument receiving no consideration. This is so because this Court in *New York State Department of Social Services* v. *Dublino*, ____ U.S. ____ (1973) 37 L. Ed. 2d 688, expressly cited *Wyman* v. *James* as an example of regulation "promulgated within the legitimate sphere of state administration" (37 L. Ed. 2d 688, at 699).

II

The provisions of New York Social Services Law § 101-a (2)(3) "are not in violation of any specific provision of the Constitution or the Social Security Act." (*New York State Department of Social Services* v. *Dublino, supra*, ____ U.S. ____, (1973), 37 L. Ed. 2d 688, 700; *Jefferson* v. *Hackney*, 406 U.S. 535, 541 (1972).) Thus, it was error for the Court below to declare the statute "• • • void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC".[10]

New York Social Services Law § 101-a "develops" and "implements" a State program under which the State of New York undertakes (a) to establish paternity of children born out of wedlock and to secure their support and (b) to secure support for deserted or abandoned children. New York's program is, we submit, in complete accord with 42 U.S.C. § 602(a)(17)(A)(i)(ii) and other provisions of the

[10] Even if it is assumed that New York Social Services Law § 101-a (2) (3) creates a condition of eligibility, such a condition would not conflict with the provisions of the Social Security Act. *Cf. New York State Department of Social Services* v. *Dublino, supra.* Since the lack of conflict between the State statute and the Social Security Act is thus apparent, we do not now brief legislative history. Our briefing in this regard in the Court below is to be found in "Brief of Defendant Lavine", "Reply Brief of Defendant Lavine" and a "Supplemental Memorandum" filed with the Court below and sent to this Court by the Clerk of the United States District Court for the Northern District of New York on November 28, 1973.

Social Security Act, including 42 U.S.C. § 602(a)(7) heretofore alluded to.

The primary responsibility for the support of the child is with its parents, not with the State. Under New York Family Court Act § 413, the father of a child is chargeable with its support if possessed of sufficient means or able to earn such means. Under the provisions of Family Court Act § 414, if the father of a minor is dead or incapable of supporting his child or cannot be found within the State, the mother of such child is chargeable with its support. And Family Court Act § 513, as to children born out of wedlock provides, *inter alia*, that "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses." New York Social Services Law § 101-a(2)(3) furthers the implementation of these basic concepts. Permitting a mother to receive public assistance while refusing to participate in obtaining support for herself and the dependent child is contrary to fundamental principles governing the duties of parents as regards their children.

Here involved is a fundamental State judgment that limited State welfare funds should be permanently expended only on behalf of those truly in need. Appellant's position is consistent with the provisions of the Social Security Act.

The Social Security Act should not be construed in such a manner as to free parents from the carrying out of such fundamental duties. The HEW regulation (45 C.F.R. § 233.90(b)(4)(i)(ii)) is recognition of such fundamental duties.[11]

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[11] The HEW regulation is directly involved in the case at bar. The Iowa Court in *Burns* v. *Doe* (No. 73-406) did not consider the effect of the regulation upon its judgment because the regulation became effective only *after* judgment in the Iowa case was rendered.

III

The question here presented goes to the heart of the AFDC program and is, we submit, so substantial as to require plenary consideration, with briefs on the merits and oral argument.

CONCLUSION

Appellant respectfully prays that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

Dated: January 2, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant
Lavine

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

APPENDIX A

Memorandum-Decision and Order

J. R. S.
U. S. District Court
N. D. of N. Y.
Filed
Sep 26 1973
At .... o'clock .... M.
J. R. Scully, Clerk
Albany

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor children, TAMMY LYNN, and LISA MARIE, and on behalf of all others similarly situated, *et al*,

Plaintiffs,

vs.

ABE LAVINE, Commissioner of the Department of Social Services of the State of New York, *et ano.*,

Defendants.

72-CV-163

Appearances:

Onondaga Neighborhood Legal Services, 827 East Genesee Street, Syracuse, New York, Attorney for Plaintiffs.

Douglas A. Eldridge, Esq., Of Counsel.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York 12224. Attorney for Defendant Abe Lavine.

Ruth Kessler Toch, Solicitor General.

Alan W. Rubenstein, Principal Attorney Of Counsel.

John B. LaParo, Welfare Attorney, Onondaga County Department of Social Services, 600 South State Street, Syracuse, New York 13201, Attorney for Defendant Lascaris.

James H. Hughes, Esq., Assistant Welfare Attorney Of Counsel.

Before MANSFIELD, Circuit Judge, and FOLEY and PORT, District Judges.

EDMUND PORT, D. J.

The Supreme Court vacated a judgment of this Court[1] which declared 18 NYCCR § 369.2(f)(3)(ii)(e)[2] invalid as

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[1] *Lavine* v. *Shirley*, 409 U.S. 1052 (1972).

[2] 18 NYCRR § 369.2(f)(3)(ii)(e) was the implementing regulation to Social Services Law § 101-a before the 1972 amendment, and provides as follows:

> (a) *Abandonment or desertion.* (*1*) All situations in which a parent is absent from the home and failing to comply with a court order for support or to fully support without court order, shall be classified as abandonment or desertion, and referred to the law enforcement officer in accordance with department regulations.
>
> (*2*) A parent or other relative applying for or in receipt of an ADC grant for a child who has been deserted or abandoned shall be informed that a report of the desertion or abandonment will be made to the law enforcement official within 30 days of such occurrence or of the initial granting of assistance.
>
> (*3*) A parent or other relative shall be required to furnish pertinent information in the location and prosecution of a deserting or abandoning parent.

(Footnote continued on following page)

establishing AFDC eligibility requirements in conflict with provisions of the Social Security Act, and remanded the case to this court for further consideration in light of Chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a, as amended),[3] which had become effective subsequent to this court's decision.

(Footnote continued from preceding page)

(4) A parent or other relative who fails to cooperate with the social services official in the location and prosecution of the deserting or abandoning parent shall be ineligible for public assistance; and such failure to cooperate shall, in appropriate cases, be brought to the attention of the Family Court for whatever action the court may wish to take under such circumstances; such person's needs shall be excluded from consideration and the needs of the remaining family members shall be met in accordance with Part 352 of this Title; except that, if there is no other eligible relative in the home, such needs of the remaining family members shall be met as a protective payment in accordance with Part 381 of this Title.

(5) The agency shall fully utilize the services of the department's bureau of registry and location of deserting parents in its efforts to locate the missing parent.

[3] Section 101-a of the New York Social Services Law was amended by Chapter 687, Section 1, of the 1972 Laws of New York. Section 101-a, as amended, provides as follows:

§ 101-a. Proceedings to compel support by persons in need thereof

1. A recipient of public assistance or care or a person liable to become in need thereof may bring proceedings in a court of competent jurisdiction against any person responsible for his or her support as provided in section one hundred one of this chapter to compel any such person so responsible to provide for or contribute to such support.

2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

(Footnote continued on following page)

In order to reactivate the matter in the district court after the remand, plaintiffs' attorney obtained an order requiring the defendants to show cause why the three judge court should not be reconvened to reconsider its decision in light of the amendment to § 101-a. Motions were also made for leave to file an amended complaint to squarely put the provisions of the amended section in issue, and for leave for Anna Stuck to intervene as plaintiff. The motions were granted.

Defendants have moved to dismiss the amended complaint. Affidavits and other matters outside the pleadings having been presented, those motions shall be treated as motions for summary judgment. Rule 12(b), F.R.C.P.

(Footnote continued from preceding page)

(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act.[1]

(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act.[1]

3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipient fails to assist or cooperate as required by the provisions of this section or other provisions of law.

As amended L. 1972, c. 687, § 1.

Prior to the amendment, § 101-a contained only the language now in subparagraph 1.

AMENDED COMPLAINT

The amended complaint does not reallege the facts concerning the original named plaintiffs. This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated, seeking declaratory and injunctive relief from enforcement against them of § 101-a of the New York Social Services Law because of their failure to cooperate in support proceedings as required by the section, and seeking as well the payment of benefits withheld on authority of the section.

We conclude that, while class action status and retroactive payment of benefits should be denied, the plaintiff is entitled to the declaratory and injunctive relief sought.

FACTS

The pertinent facts may be stated briefly. Plaintiff Intervenor has four children, aged 12, 9, 8 and 2. The family has received AFDC for some time. On January 17, 1973, she applied for recertification. This caused the agency to discover that there was no support order outstanding for the youngest illegitimate child. Plaintiff indicated that she did not desire that a paternity action be brought against the putative father.

She refused to cooperate in connection with such an action beyond stating the name of the putative father and the town where he lived, asserting he was unable to support the child because of physical disabilities. Her refusal was also based on unpleasantness in connection with similar proceedings brought against the father of her three other children.

After a fair hearing, the family's grant was reduced on the authority of § 101-a to reflect the exclusion therefrom of the plaintiff for her failure to cooperate. According to respective counsel, the reduction was between $75 and $100 per month. The Anna Stuck family, apart from § 101-a, is otherwise eligible for full assistance.

DISCUSSION

Plaintiffs, invoking our jurisdiction pursuant to 42 U.S.C. § 1343(3),(4) and 28 U.S.C. § 1331, have raised a substantial question with respect to the constitutionality of New York Social Services Law § 101-a, as amended, which warranted the convening of a three-judge court. *King* v. Smith, 392 U.S. 309, 312 n.3 (1968). However, in view of the fact that plaintiffs also raise an issue as to whether § 101-a violates the Supremacy Clause, which we believe to be dispositive of the case, our decision follows the Supreme Court's repeated direction that in such a case we should adjudicate the statutory claim rather than indulge in a constitutional ruling. See *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *Harmon* v. *Brucker*, 355 U.S. 579, 581 (1958).

Turning to the statutory claim, the Supreme Court's remand requires us to determine whether New York's amendment of § 101-a imposes conditions on eligibility for aid to dependent children which are not authorized by the Social Security Act and, more particularly, by the 1967 Amendments to that Act, commonly referred to as its NOLEO (Notice to Law Enforcement Officers) provisions.[4]

[4] 42 U.S.C. § 602(a)(17).

The latter require a state administering aid to dependent children to develop and implement, with respect to a child born out of wedlock who receives such aid and who has been deserted or abandoned, a program to establish the paternity of the child and to secure support from the deserting parent.

Two distinct goals of the Social Security Act's AFDC program are involved. Aid to Families with Dependent Children is premised on the fact that when a family is deserted by a parent who fails to fulfill his obligation of support, the family as such requires assistance. One of the goals of AFDC is to provide this assistance. An equally desirable goal is that the absent parent fulfill his legal obligation to support his child. A goal of the NOLEO provisions was to encourage and facilitate obtaining this support. While distinct, these goals are not necessarily conflicting. They become so only when one is pursued as the expense of the other.

While we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by § 101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits.

The authority is contrariwise. Every court that has considered the question of such conditions of eligibility has found itself compelled to invalidate them.[5] To argue, as

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[5] *See, e. g., Doe* v. *Shapiro*, 302 F. Supp. 761 (D.Conn. 1969), app. dis., 396 U.S. 488 (1970); *Doe* v. *Swank*, 332 F. Supp. 61 (N.D.Ill.), aff'd *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971); *Meyers* v. *Juras*,

(Footnote continued on following page)

the state does here, that it is only the noncooperating mother who is penalized and not the innocent child or children[6] is unrealistic. The distinction has been consistently rejected by the courts. Indeed the House Report (No. 1300) with respect to the 1950 amendment of 42 U.S.C. § 606(b) (70 Stat. 850) recognized the interdependency of provisions for and to the child and its caretaker-mother, stating:

(Footnote continued from preceding page)
327 F. Supp. 759 (D.Ore.), aff'd 404 U.S. 803 (1971); *Taylor* v. *Martin*, 330 F. Supp. 85 (N.D.Cal.), aff'd *sub nom. Carlson* v. *Taylor*, 404 U.S. 980 (1971); *Godfrey* v. *Stanton*, Civil No. 72 F 77 (C.D.Ind. decided June 8, 1973). The recent decision of a three-judge district court in *Doe* v. *Norton*, ____ F. Supp. ____ (D.Conn. Sept. 5, 1973), which upheld the constitutionality of a Connecticut statute obligating a mother to disclose her child's paternity and to prosecute a paternity suit against the putative father, is clearly distinguishable. There the statutory obligation, unlike that in the present case, did not impose an additional condition on eligibility for aid, payment of which continued regardless whether the mother complied with the Connecticut law. Indeed the parties here have recognized the possibility that various New York statutes may be interpreted to permit the New York Social Services Department to institute proceedings to compel a mother to cooperate in establishing paternity without conditioning aid on such cooperation. See Social Services Law §§ 102, 132a, 144; *In re Putman*, 208 N.Y.S.2d 896 (1970); NYCPLR §§ 3101, 3102, 3126; *Schwartz* v. *Schwartz*, 23 App. Div. 2d 204, 259 N.Y.S.2d 751 (App. Div. 1st Dept. 1965); *Green* v. *Brown*, 65 Misc.2d 226, 317 N.Y.S.2d 104 (Family Court, Westchester County, 1970); N.Y. Judiciary Law §§ 750, 753, 773, 774. In the event that existing statutes prove to be ineffectual or too cumbersome to achieve the objective, the way is open for the legislature to enact an appropriate law without conditioning continued aid upon such procedure.

[6] Three of the children making up the family unit here are not even offspring of the nonsupporting putative father.

[7] *Doe* v. *Harder*, 310 F. Supp. 302 (D.Conn.), app. dis., 399 U.S. 902 (1970); *Woods* v. *Miller*, 318 F. Supp. 510 (W.D.Pa. 1970); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Doe* v. *Gilman*, 347 F. Supp. 482 (N.D.Iowa), modified on other grounds, Dkt No. 72-1605 (8 Cir., decided June 6, 1973).

> "In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly, in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. *Since the person caring for the child must have food, clothing, and other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs.*" (Emphasis supplied)

No one has questioned, nor do we here, that Congress has the power to condition eligibility for assistance upon new and additional requirements.[8] What the cases construing the NOLEO provisions make clear, however, is that in enacting them Congress did not utilize this power.

That the State lacks this power is equally well established:

> "[I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[9]

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[8] *See, New York Department of Social Services* v. *Dublino*, 41 U.S.L.W. 5047 (U. S. June 21, 1973).

[9] *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

EFFECT OF RECENT HEW REGULATION AMENDMENT

The defendants invoke a quite recent amendment to HEW regulations[10] as lending substantial support to the

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[10] The change takes the form of an amendment to 45 C.F.R. § 233.90. The amendment and introductory commentary, as set forth in 38 Fed. Reg. 10940 (No. 85, May 3, 1973), are in their entirety as follows:

TITLE 45—PUBLIC WELFARE

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

PATERNITY AND SUPPORT

Notice of proposed rulemaking for the program of Aid to Families With Dependent Children (AFDC) was published in the FEDERAL REGISTER on December 19, 1972 (37 FR 27637). The proposed regulations related to the U.S. Supreme Court summary affirmance of three cases dealing with refusal of caretaker relatives to cooperate in establishing paternity and securing support for the children.

The major recommendations regarding this proposal were that issuance be delayed until resolution of a related New York case, *Lavine* v. *Shirley*, recently remanded by the U.S. Supreme Court; that the uncooperative caretaker be excluded from the grant for the children; and that the regulations not be issued at all.

After consideration of all comments, the regulation is adopted with changes to make clear that AFDC may not be denied to the child, but may be denied to the uncooperative caretaker relative.

Section 233.90, part 233, chapter II, title 45 of the Code of Federal Regulations is amended by adding to paragraph (b) a new subparagraph (4) as set forth below:

§ 233.90 Factors specific to AFDC.

* * * * *

(b) *Condition for plan approval.*—(1) A child may not be denied AFDC either initially or subsequently "because of the conditions of the home in which the child resides", or because the home is considered "unsuitable", unless "provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child". (Sec. 404(b) of the Social Security Act.)

(Footnote continued on following page)

validity of § 101-a, as amended. We have withheld our decision until after its effective date in order to authoritatively consider its effect.

The portion of the amendment permitting denial of assistance to parents or caretakers refusing to cooperate in obtaining support from absent parents was not in the amendment as originally proposed,[11] and was prompted, we

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(Footnote continued from preceding page)

(2) • • •

(3) • • •

(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist:

(i) In the establishment of paternity of a child born out of wedlock; or

(ii) In seeking support from a person having a legal duty to support the child;

But neither this nor any other provision of these regulations should be construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.

• • • • •

(Sec. 1102, 49 Stat. 647 (U.S.C. 1302).)

Effective date.—These regulations in this section shall become effective July 2, 1973.

Dated April 19, 1973.

PHILIP J. RUTLEDGE,
Acting Administrator,
Social and Rehabilitation Service.

Approved April 30, 1973.

FRANK CARLUCCI,
Acting Secretary.

[FR Doc. 73-8843 Filed 5-2-73; 8:45 am]

[11] As originally proposed in 37 Fed. Reg. 27637 (No. 244, Dec. 19, 1972), the amendment to 45 C.F.R. 233.90 ended with the word "child." in (b)(4)(ii), and it was stated that the proposed amendment required, as a condition for approval of a state plan, that "[t]here may be no denial of assistance because a caretaker relative does not cooperate . . ."

are advised by defendant Lavine's counsel, by requests sent by Lavine and others to HEW. The amendment is a departure from the agency's past position.[12] It also runs counter to the consistent construction placed on the Social Security Act by the courts.[13]

In our view the amended regulation does little to support the validity of § 101-a.

> "[T]he principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a) (10) that aid be furnished 'to *all eligible* individuals.' "[14]

This point was reiterated in *New York Department of Social Services* v. *Dublino*,[15] which case supports rather than detracts from our decision here. In *Dublino*, the question before the Court was "whether that part of the Social Security Act known as the federal Work Incentive Program, pre-empts the provisions of the New York Social Welfare Law commonly referred to as the New York Work Rules."[16] The federal Work Incentive Program (WIN) and NOLEO were both parts of the 1967 AFDC amendments to the Social Security Act. A striking distinction

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[12] *See., e. g.,* 45 C.F.R. 235.70(a), promulgated in February, 1971, and still in effect, wherein it is said of the NOLEO requirement of giving notice to law enforcement officials of the granting of AFDC to an abandoned child, that this "requirement has no effect upon the determination of eligibility. It is a requirement upon the agency . . ."

[13] *See*, cases cited note 7, *supra.*

[14] *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

[15] 41 U.S.L.W. 5047 (U.S. June 21, 1973).

[16] 41 U.S.L.W. at 5047.

between the two is that with respect to WIN, Congress made participation a condition of eligibility,[17] while Congress has made no such provision in regard to NOLEO. The Court in *Dublino* specifically noted the law's requirement that "cooperation in WIN is necessary for employable individuals to continue to receive assistance."[18]

The Court's disposition in *Dublino* furnishes further support. While the Court resolved the pre-emption question against the plaintiffs, it nevertheless remanded the case for consideration of whether specific New York provisions were in conflict with specific Social Security Act provisions,[19] the very issue before this court.

As to the weight accorded HEW's interpretation of the Act in *Dublino*, a number of distinguishing factors should be noted. The Court stated that the agency "never" considered the WIN legislation to be pre-emptive, that it had "followed consistently" a policy of approving state work requirements, and that Congress presumably knew of this "settled" administrative policy.[20] Accordingly, the Court felt the agency's construction of the Act should be followed, in the absence of compelling indications that it is wrong.[21] As for the instant case, the department's new interpretation effective July 2, 1973 certainly may not be terms settled or consistent nor may it be said the agency was never

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[17] *See*, 42 U.S.C. § 602(a)(19)(F), 1967 amendments. In 1971 amendments, Congress made it even clearer that "every individual, as a condition of eligibility for aid" must participate. 42 U.S.C. § 602(a)(19)(A).

[18] 41 U.S.L.W. 5049.

[19] 41 U.S.L.W. 5052.

[20] 41 U.S.L.W. at 5051-52.

[21] 41 U.S.L.W. at 5052.

of a contrary opinion. To the contrary, prior to July 2, the agency was never of the opinion that a non-cooperating AFDC recipient could be cut off from benefits; such "settled" and "consistently followed" agency interpretation as existed was that NOLEO provisions could *not* be transformed into conditions of eligibility.

Moreover, the unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judicially.

CLASS ACTION STATUS

Class action status should not be granted here due to other pending federal court actions in the State of New York. Intervening plaintiff Anna Stuck's assistance was terminated, after a fair hearing, for her failure to cooperate in obtaining support from the absent parent of her illegitimate child. All others "similarly situated" are embraced within other actions. *Doe* v. *Lavine*[22] concerns two named unwed plaintiffs in the same situation, and in *Lewis* v. *Lavine*[23] Judge Brieant granted a motion for class action status in a broader case involving § 101-a He defined the class as all those in the state denied assistance for failure to name the father of a child, or disclose his whereabouts, or cooperate in paternity or nonsupport proceedings, except those already maintaining actions in state or federal courts. No purpose would be served by creating an includ-

[22] *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972).

[23] *Lewis* v. *Lavine*, Dkt No. 72-CV-4249 (S.D.N.Y., decided March 6, 1973, order signed May 14, 1973).

ing or overlapping class. Accordingly, class action status in this suit is denied as unnecessary, and more importantly, to avoid the possibility of any individual being subject to multiple or conflicting decisions.

CONCLUSION

THE NOLEO provisions have been on the books for six years. During that period, courts have repeatedly and consistently construed their effect. If there is to be a change at this late date, it might better result from congressional action.

We are mindful of the Court's admonition that "[c]onflicts [between state and federal programs] to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial," and also that "if there is a conflict of substance as to eligibility provisions, the federal law of course must control."[24]

In light of the adjudicated cases dealing with similar state attempts to limit eligibility and the contrast between the federal agency's recent and past interpretation of the effect of failure to cooperate, the additional eligibility requirement created by § 101-a, being in conflict with requirements prescribed by Congress, is invalid and unenforceable.

ORDER

Accordingly, upon all the proceedings had herein, and the findings of fact and conclusions of law as contained in the decision herein, duly rendered, the court having jurisdiction of the parties and the subject matter, it is

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[24] *New York Department of Social Services* v. *Dublino*, 41 U.S.L.W. 5047, 5052 n. 29 (U.S. June 21, 1973).

ORDERED, ADJUDGED and DECREED, that the defendants' motions to dismiss be and hereby are denied, and that summary judgment in favor of the plaintiff Anna Stuck against the defendants Lavine and Lascaris be and the same hereby is granted, declaring § 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC; and it is futher

ORDERED, that the defendants are permanently enjoined from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children; and it is further

ORDERED, that class action status is denied; and it is further

ORDERED, that plaintiff's demand for retroactive payment of the amounts wrongfully witheld from her is denied.[25]

WALTER R. MANSFIELD,
U.S.C.J.

JAMES T. FOLEY,
U.S.D.J.

EDMUND PORT,
U.S.D.J.

Dated: September 23, 1973.

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[25] Despite the difference in equities between this case and *Rothstein* v. *Wyman*, 467 F.2d 226 (2 Cir. 1972), and the contrary view of other courts, *see*, *Jordan* v. *Weaver*, 472 F.2d 985 (7 Cir. 1973), cert. granted, *sub nom. Edelman* v. *Jordan*, 41 U.S.L.W. 3644 (U.S. June 12, 1973) and *Story* v. *Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972), we feel constrained by this circuit's views regarding the Eleventh amendment as enunciated in Rothstein to deny the relief of judicially ordered retroactive payments. Our denial is without prejudice to any rights plaintiff may have to obtain such payment administratively.

APPENDIX B

Notice of Appeal to the Supreme Court of the United States

U. S. District Court
N. D. of N. Y.
Filed
Nov 14 1973
At .... o'clock ....M.
J. R. Scully, *Clerk*
Utica

UNITED STATES DISTRICT COURT

For the Northern District of New York

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similary situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated, and JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Plaintiffs,

against

ABE LAVINE as Commissioner of the Department of Social Services of the State of New York; JOHN LASCARIS as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities,

Defendants.

72-CV-163.

Notice is hereby given that defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, hereby appeals to the Supreme Court of the United States from the final order

entered in this action on September 26, 1973, as amended on October 4, 1973, which (1) denied summary judgment to defendants and granted summary judgment in favor of the plaintiff Anna Stuck against defendants declaring section 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC, and (2) permanently enjoined defendants from denying or terminating AFDC assistance to plaintiff Anna Stuck for failure to cooperate in obtaining support from an absent parent of her children, and defendant Lavine appeals from each and every part of that order except that no appeal is taken from those parts of that order which (a) permanently enjoined defendants from denying or terminating AFDC assistance to the minor children of Anna Stuck as provided in that order; (b) denied "class action status"; and (c) denied "plaintiff's demand for retroactive payment of the amounts wrongfully withheld from her."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, November 13, 1973.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York

By ALAN W. RUBENSTEIN
Principal Attorney
Attorneys for Defendant Lavine
Department of Law
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Notice of Appeal to the Supreme Court of the United States

To:

Honorable J. R. Scully, Clerk
United States District Court for the
Northern District of New York
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APPENDIX C

Statutes of the United States

"42 U.S.C. § 602*

"(a) A State plan for aid and services to needy families with children must

• • •

"(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

"(11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent;

• • •

"(17) provide—

"(A) for the development and implementation of a program under which the State agency will undertake—

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

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* 1973 pocket part, page 106 *et seq.*

"(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

"(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17)(A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan;

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"(21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe—

"(A) the name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan—

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title,

"(B) the last known address of such parent and any information it has with respect to the date on

which such parent could last be located at such address, and

"(C) such other information as the Secretary may specify to assist in carrying out the provisions of section 610 of this title;

"(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part—

"(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

"(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State;"